Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-709

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

BRENDA SHEMPERT and LYNNE GIBEL,

*Petitioners,*

*vs.*

HARWICK CHEMICAL CORPORATION and
TOM BRECKENRIDGE,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

DEAN E. WESTMAN
*Counsel of Record*
MILLISOR & NOBIL CO., L.P.A.
*Attorneys for Respondents*
9150 South Hills Blvd.
Suite 300
Cleveland, Ohio 44147-3599
(440) 838-8800

150403

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

## STATEMENT PURSUANT TO RULE 29.6

At the time this action commenced, the corporate defendant was Harwick Chemical Corporation. It had no parent or subsidiary companies. It has since changed its name to Harwick Standard Distribution Corporation and still has no parent or subsidiary companies.

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Respondents, Harwick Chemical Corporation and Tom Breckenridge, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in the instant case.

## INTRODUCTION

In their Petition for Writ of Certiorari, Petitioners have misstated the pertinent facts and the law that bear on the issue presented for review. Petitioners challenge the decision of the Eighth Circuit Court of Appeals, which affirmed the dismissal of Title VII claims because Petitioner Brenda Shempert ("Shempert") failed to comply with the statutory requirement that a sworn charge of discrimination be filed with the United States Equal Employment Opportunity Commission ("EEOC") within one hundred eighty (180) days after the last alleged act of discrimination. As demonstrated below, however, the Eighth Circuit has not taken a unique legal stance on any of the issues addressed in Shempert's Petition. Rather, the Eighth Circuit has taken the same approach as other circuits on the facts presented.

Prior to initiating her lawsuit, Shempert filed an Intake Questionnaire ("Charge Information Form") and a "Charge of Discrimination" with the EEOC, alleging that she had been sexually harassed. Shempert received her "Notice of Right to Sue", and brought this lawsuit against Harwick Chemical Corporation ("Harwick") and Tom Breckenridge ("Breckenridge") individually. After limited discovery directed specifically at the timeliness of Shempert's Charge of Discrimination, Harwick and Breckenridge moved for summary judgment.

Petitioner Lynne Gibel ("Gibel") subsequently filed a Motion to Intervene in the lawsuit, claiming that she had also

been sexually harassed, and that her claim had common questions of law and fact with the suit filed by Shempert. Gibel had never filed a "Charge of Discrimination" with the EEOC, but was attempting to rely on Shempert's untimely Charge.

Judge Susan Webber Wright of the United States District Court for the Eastern District of Arkansas granted Respondents' Motion for Summary Judgment, recognizing that Shempert had failed to timely file a Charge of Discrimination with the EEOC. This ruling rendered Gibel's Motion to Intervene moot. Recognizing that a supervisor cannot be held individually liable under Title VII as an "employer", the District Court also granted Summary Judgment to Breckenridge individually.

Shempert and Gibel filed a Joint Motion for Reconsideration with the District Court, which was denied. Both thereafter appealed to the Eighth Circuit Court of Appeals, but failed to pursue any claims against Breckenridge on appeal, leaving Harwick as the sole Appellee before the Eighth Circuit.

Respondents seek denial of the instant Petition for Writ of Certiorari on the grounds that the issue presented does not warrant review by this Court inasmuch as this case does not create a serious conflict among the Circuit Courts of Appeal. Furthermore, the facts of the instant dispute are distinguishable from the authority cited by Petitioners in support of their contention that the Eighth Circuit Court of Appeals has isolated itself from the majority of other Circuit Courts on the issue of the proper filing of a Charge of Discrimination with the EEOC. Finally, Respondents seek summary dismissal of the Petition for Writ of Certiorari with respect to all claims asserted against Respondent Breckenridge inasmuch as Petitioners failed to preserve the issue of his dismissal as an individual defendant in their appeal to the Eighth Circuit Court of Appeals.

## LEGAL ANALYSIS

Certiorari is not warranted in this case because the ruling of the Eighth Circuit Court of Appeals, finding that Shempert failed to comply with the statutory requirement of filing a timely Charge of Discrimination with the EEOC, is supported by case law from other Circuit Courts of Appeal, is distinguishable from the case law cited by Petitioners, and does not present a conflict that "seriously interferes with the orderly, national administration of Title VII."

1. In their first and second Reasons for Granting the Writ, Petitioners misrepresent the underlying facts of this case in an effort to portray this case as being on all fours with several other cases from other jurisdictions relating to the proper filing of a timely Charge of Discrimination under Title VII. Petitioners focus their argument and analysis on many cases in which a Title VII claimant filed a charge of discrimination with the EEOC but which charge was technically deficient, for example, lacking a sworn or verified signature. In the present case, the issue presented to the Courts below was whether Shempert's completion of an EEOC Intake Questionnaire was a sufficient vehicle by which to satisfy the statutory requirement of filing a "Charge" of Discrimination. Many of the cases cited by Petitioners draw a clear distinction between the necessity of filing a *charge*, versus providing information to the EEOC via some other means, such as by letter or questionnaire. Petitioners' argument blurs this distinction between an unverified Charge and an Intake Questionnaire.

For example, in numbered paragraph (1) on page 6 of their Petition, Petitioners state that only the Eighth Circuit refuses to adhere to 29 C.F.R. § 1601.12(b), which provides for the relation back of a subsequent verification for an earlier filed charge. What Petitioners fail to mention is that, in the present

case, the relation back sought was the relation back of a verified charge to cleanse and correct the filing of an unverified, unsworn EEOC Intake Questionnaire. It is undisputed in the record that at no time during the 180 day charge-filing period did Shempert ever file a Charge — verified or unverified — with the EEOC. To the contrary, Shempert's sole action during the 180 day period was the completion of an unsworn EEOC Intake Questionnaire. This factual distinction explains the Eighth Circuit's rationale and stance on Shempert's timeliness argument.

This case, simply put, is not about Shempert filing an unsworn Charge within the statutory period and thereafter seeking to verify that Charge through the relation-back mechanism provided for in 29 C.F.R. § 1601.12(b). Instead Shempert merely completed an EEOC Intake Questionnaire during the 180 day charge filing period, but did not sign, verify or file an EEOC Charge until after the 180 days had expired. In essence, the rulings below hold, consistent with other Circuit authority, that the Intake Questionnaire was insufficient to satisfy the requirement that a timely *Charge* be filed with the EEOC and therefore, the subsequent filing of her actual Charge of Discrimination outside of the 180 day period could not "relate back" to satisfy the statutory charge filing requirement.

Indeed, this very distinction is explained in *Whitekiller v. Campbell Soup, Inc.*, 925 F. Supp. 614 (W.D. Ark. 1996). The *Whitekiller* court explained that the Eighth Circuit's position did not in effect nullify 29 C.F.R. § 1601.12(b), but instead the Eighth Circuit's rationale was that an intake questionnaire filed with the EEOC, not taken under oath, did not constitute a valid charge under Title VII, and in any event, the intake questionnaire had not been timely filed with the EEOC and therefore relation back could not cure the timeliness defect. *Id.* at 616-17.

Moreover, many of the cases cited by Petitioners to support their claim that the Eighth Circuit has taken a unique position on the issue of relation back to cure a defect in an Intake Questionnaire are distinguishable. A close review of the facts in those cases shows that in many instances, the rationale of the deciding court turned on how the Intake Questionnaire was treated by the EEOC. For instance, in *Philbin v. General Electric*, 929 F.2d 321 (7th Cir. 1991), the Seventh Circuit, in upholding the application of the relation-back principle to the filing of an Intake Questionnaire, noted:

> Recognition that the regulation [29 C.F.R. § 1601.12(b)] was within the authority of the EEOC does not mean that every intake questionnaire which is subsequently verified will constitute a charge. In this case, however, *other factors were present which fulfilled the purpose of the charge requirement.* First, the Intake Questionnaire was treated as a charge by Philbin and the EEOC. When Philbin filed the Intake Questionnaire, she signed a note indicating that she wished to file a sex discrimination charge. The EEOC accepted the questionnaire and note and assigned a charge number to the claim. Second, the EEOC then notified Philbin's employer that a charge had been filed against it. The Intake Questionnaire thus provided notice of a charge to the employer within the 300-day time period, and fulfilled one of the primary purposes of the charge and timeliness requirements. Finally, the Intake Questionnaire was signed by Philbin, although it was not under oath or affirmation. That signing nevertheless provided an affirmation by Philbin of the allegations of the questionnaire. Those factors, in conjunction with the subsequent verification of the formal charge,

> fulfilled the purposes of the charge requirement and complied with the statutory requirement that the charge be in writing and under oath.

*Id.* at 324 (emphasis supplied). Moreover, the court in *Philbin* found that the EEOC had sent Philbin a completed Charge form, but did not afford her enough time to return the charge within the 300-day filing period. Thus, the Seventh Circuit held that "the EEOC's inaction in completing and forwarding the formal charge in a timely manner should not bar the plaintiff from proceeding on her Title VII claim." *Id.* at 325.

This same distinction between Intake Questionnaires and Charge forms exists in many of the additional cases cited by Petitioners, and emphasizes the clear dichotomy in the case law between the EEOC's treatment of an Intake Questionnaire as an *ipso facto* Charge of Discrimination versus treating the Questionnaire as merely a preliminary tool used to elicit information for later incorporation into the complaining party's Charge of Discrimination. *See, e.g., Early v. Bankers Life and Casualty Co.*, 959 F.2d 75 (7th Cir. 1992) (recognizing distinction in how EEOC treats the Intake Questionnaire either as charge *per se* or preliminary step to filing of a charge); *Perkins v. Marshall, Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991) (upholding dismissal of Title VII claim where intake questionnaire was not treated as charge by EEOC and therefore no timely charge was filed); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988) (Seventh Circuit rejects argument that "virtually every completed Intake Questionnaire . . . would fall within the definition of a charge. . . . [T]he EEOC does not routinely treat Intake Questionnaires as charges. . . . Moreover, the relevant decisionmakers at the EEOC plainly did not treat Steffen's Intake Questionnaire as a charge."); *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982) (EEOC treated intake form as charge); *EEOC v. Appalachian*

*Power Co., Inc.*, 568 F.2d 354 (4th Cir. 1978) (affirming dismissal of Title VII for failure of plaintiff to have filed a charge in writing under oath or affirmation as required by 42 U.S.C. § 2000e-5(b); *Halas v. Ford Motor Company*, 987 F. Supp. 227 (W.D. N.Y. 1997) (ADA questionnaire treated as charge and plaintiff told by EEOC that he was not late in filing charge); *Bacon v. Allstate Insurance Company*, No. 93 C 1701, 1995 U.S. Dist. LEXIS 8168 (N.D. Ill. 1995) (EEOC assigned letter charge number, notified employer of charge, but plaintiff never verified underlying charge prior to issuance of right to sue letter); *Ferch v. Syncor Int'l Corp.*, 1990 U.S. Dist. LEXIS 5428 (N.D. Ill. 1990) (court rejected plaintiff's request to treat charge receipt affidavit as equivalent of a sworn charge, citing 29 C.F.R. § 1601.12(b) to support its rationale that "where the original unsworn submission is not a 'charge,' the filing of a sworn charge after the expiration of the 300 days will not cure the defect.").

2. Contrary to Petitioners' assertion in their Third Reason for Granting the Writ, the decision of the Eighth Circuit Court of Appeals in the instant matter was not erroneous, but instead represents a well-reasoned decision that the deference to be afforded to the EEOC in the interpretation of its implementing regulations is limited by the language of the controlling statute, here 42 U.S.C. § 2000e-5(b). Specifically, section 2000e-5(b) provides that a valid charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The Eighth Circuit fashioned its decision in the instant matter so as not to negate the statutory mandate that a charge of discrimination be under oath or affirmation.

Furthermore, the Eighth Circuit did not err in refusing to rescue Shempert's claim by applying equitable tolling principles. Indeed, the same day the Eighth Circuit decided this

matter, it decided two similar appeals on the issue of compliance with the charge filing requirements of Title VII, both of which cases were decided against the employer on equitable tolling grounds. In *Lawrence v. Cooper Communities*, 132 F.3d 447 (8th Cir. January 6, 1998), the plaintiff, after receiving advice from an attorney, filled out a charge information form ("CIF"), placed her unverified signature on the form, and sent the CIF to the EEOC's office. After receiving the CIF, the plaintiff was advised by the EEOC that an "unperfected charge" had been filed and that the EEOC would send her a copy of the perfected charge when it was completed. By the time the actual charge was sent to the plaintiff for her review and signature, however, the 180 day charge filing period had lapsed.

The Eighth Circuit in *Lawrence* held that the charge was not timely filed. The court decided, however, that the plaintiff was entitled to an equitable tolling of the filing period because she sent in the CIF within the filing period and it was reasonable for her to rely on the EEOC's erroneous belief that the charge could be perfected outside the 180 day period. The court also relied upon the fact that it was the EEOC, and not the plaintiff, who failed to complete the formal charge form and obtain the plaintiff's verification until after the 180-day period had expired. Ultimately, the court found that the EEOC misled the plaintiff into believing that she had timely met all of the filing requirements and for that reason invoked the doctrine of equitable tolling.

Again in *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455 (8th Cir. January 6, 1998), the plaintiff, who likewise had received pre-charge counseling from an attorney, went to the EEOC office for the purpose of filing a charge of discrimination. The plaintiff expressed her intent to an EEOC employee, who asked her to fill out an Intake Questionnaire. After filling out the questionnaire, the EEOC employee advised her that she

would have to return at some point to fill out additional paperwork. The plaintiff then made an appointment to come back at a later date. When she returned for this second appointment, she was asked to fill out and sign the charge, which the EEOC employee filed on that same date — a date which was beyond the 180-day filing period.

On appeal, the Eighth Circuit held that the intake questionnaire the plaintiff filed did not satisfy the statutory requirement of filing a timely charge. Moreover, the court found that the charge which was eventually filed was untimely. Nonetheless, the court agreed with the plaintiff that the filing period should be equitably tolled because she told the EEOC employee of her intent to file a charge when she first went to the EEOC office. The court indicated that it would not hold the plaintiff responsible for the intake officer's erroneous belief that the charge the plaintiff eventually signed would relate back to the filing of the intake questionnaire.

These two cases are factually distinguishable from the case at bar inasmuch as it was not the EEOC which led to Shempert's late filing of her Charge, but rather her own failure and that of her lawyer to respond to the EEOC's instructions to file the charge within the time period required by law. This distinguishing factor was paramount to the Eighth Circuit and for that reason alone the Eighth Circuit's decision is sound and should remain undisturbed.

Finally, Petitioners' representation that there has been extensive litigation involving the issue at bar is misleading at best. A close review of the cases cited in the Petition shows that numerous issues regarding the relation-back of charges have arisen in contexts that are not implicated here and cannot be reviewed given the limited facts of the instant dispute. *See e.g., Tinsley v. First Union Nat'l Bank*, 155 F.3d 435 (4th Cir.

1998) (holding plaintiff's charge timely filed within 300 day limitations period); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994) (relation back addressed post-issuance of right to sue notice); *Crites v. Kaiser Aluminum and Chem. Corp.*, No. 91-1231, 1992 U.S. App. LEXIS 6220 (4th Cir. 1992) (EEOC instructed plaintiff to return signed formal charge within thirty days which fell outside charge filing period); *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796 (9th Cir. 1981) (addressing equitable tolling in context of EEOC failure to defer charge to state FEP agency); *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975) (EEOC misrepresentation regarding timely filing of federal lawsuit following receipt of right to sue letter); *Danley v. Book-Of-The-Month-Club*, 921 F. Supp. 1352 (M.D. Pa. 1996) (underlying charge not verified until after right-to-sue notification issued by EEOC); *NAACP v. Laborers' International Union*, 902 F. Supp. 688 (W.D. Va. 1995) (involving charge filed with OFCCP instead of EEOC).

3. In their third argument in support of their Petition, Petitioners also claim that the statute is "ambiguous" and that the EEOC reasonably has interpreted that "ambiguity" as allowing relation back in virtually all circumstances. Yet, a review of the statutory language belies the assertion of an ambiguity. Indeed, the statute unequivocally states that a charge must be sworn. Supportive of the Eighth Circuit's analysis here is the observation of the District of Columbia Circuit that: "[a] court cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process". *Park v. Howard University*, 71 F.3d 904, 907 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 811 (1996). Effectively, Petitioners seek to rely upon the rationale of unrelated cases that involved different facts and circumstances but which have led to the application of the relation-back principle and/or equitable tolling.

Furthermore, Petitioners' argument that the Eighth Circuit erred in its refusal to equitably toll the charge-filing period again is unsupported by the cited case law. A close review of the cases renders the present dispute distinguishable by virtue of several facts. First, Shempert was represented by counsel throughout the period in question. Second, the EEOC did not make any affirmative representation to Shempert that she had complied with the charge-filing requirements. Third, the EEOC's instructions to Shempert were not misleading and cannot support a claim that the EEOC's conduct led to her failure to timely file her charge. Indeed, the EEOC instructed Shempert that she had to comply with the time-limits imposed by law. To be sure, Shempert and certainly her counsel were therefore notified that merely returning the executed charge itself within 30 days was not necessarily adequate to protect her interests. *Cf., e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 799 (9th Cir. 1981) (EEOC violated its own procedural regulations regarding deferral to state agency therefore equitable estoppel applied); *White v. Dallas Independent School Dist.*, 581 F.2d 556, 562 (5th Cir. 1978) (equitable estoppel applied where EEOC represented to plaintiff that "timeliness and All other requirements have been met"). This very distinction was examined in *Gonzalez v. Hoechst Celanese*, No. C-97-125, 1997 U.S. Dist. LEXIS 21522 (S.D. Tex. 1997), in which the court recognized that courts have allowed unsworn claims to constitute "charges" for purposes of Title VII jurisdiction where either (1) the EEOC treats the unsworn statement as a claim or (2) the EEOC makes a mistake in handling the unsworn claim causing the claimant to miss the deadline to file a timely formal charge. *See Id.* at *12-13. The court rejected the plaintiff's claim as failing to meet either of these requirements, stating:

> [w]here a claimant fails to file before the deadline due to his or her own mistake rather than the

> inducement of the EEOC or employer, it is not appropriate to apply the doctrine of equitable tolling.

*Id.* at *16-17. That principle is directly applicable to the facts herein, and supports the Eighth Circuit's decision.

## CONCLUSION

For each and all of the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied in the instant case.

Respectfully submitted,

DEAN E. WESTMAN
*Counsel of Record*
MILLISOR & NOBIL CO., L.P.A.
*Attorneys for Respondents*
9150 South Hills Blvd.
Suite 300
Cleveland, Ohio 44147-3599
(440) 838-8800